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THE (IL-)LEGAL INDIAN. THE TUPINAMBÁ AND THE JURIDIFICATION OF INDIGENOUS RIGHTS AND LIVES IN NORTH-EASTERN BRAZIL

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The article traces different aspects of the present-day juridification and judicialization of indigenous lives using the example of the Tupinambá Indians of the Brazilian north-east. The Tupinambá's identity is being increasingly bureaucratized by public administration and is constantly being questioned by public and private agents, in order to deny the Tupinambá's constitutional land rights. In the course of the still ongoing process of the demarcation of the Indigenous Territory Tupinambá de Olivença, indigenous inhabitants are facing a plethora of civil actions, and Tupinambá leaders are being persecuted and criminalized by the Federal Police and the judiciary. The article exposes the legal intricacies of possessory actions against indigenous people in Brazil, and discusses the different acts and attitudes of the actors of the Brazilian "juridical field" as regards indigenous rights. It suggests a view of law, law enforcement and law suits as means of social sense-making, that is, a public staging, interpretation, imagining and "mapping" of Brazil's "indigenous question", which has, ultimately, to be legitimized by society at large.

Brazil, indigenous identity, indigenous rights, legal anthropology, territorial disputes, Tupinambá Indians

One day while I was "hanging around", yet again, at the local office of the Brazilian Bureau of Indian Affairs (FUNAI) in the city of Ilhéus, north-eastern Brazil, a middle-aged man showed up, asking one of the officials on duty for a "declaration" of Indianness for his daughter. Being used to such demands, the official gave her stock response, saying that such declarations did not exist, nor was there a local "register" of indigenous people, but that the man's daughter could always, if she deemed it necessary, fill in one of the "auto-declaration" forms which the Bureau provided. As the man insisted on receiving a "declaration" from the Bureau itself, the officials started to inquire as to his family's origins and the indigenous village he belonged to. It turned out that the man was not actually living in one of the Tupinambá villages close to Ilhéus, but in the city itself, and that it was the university administration in Salvador, the state capital of Bahia, 400 km by road to the north, that was demanding proof of Indianness from his daughter. As the FUNAI officials started to entertain

some doubts about the man's claims of indigenous identity, it was agreed that he should return another day, accompanied by one of the *caciques* (chiefs) of the area who would be able to bear testimony to his and his daughter's belonging to the Tupinambá community.

In the course of this article, I will discuss three elements of the juridification of indigenous lives in Brazil, using the example of the Tupinambá Indians from the north-eastern state of Bahia: the bureaucratization and challenging of indigenous identity, the question of indigenous land rights and the possessory proceedings against indigenous peasants, and, if briefly, the criminalization of indigenous leaders committed to the demarcation of the Tupinambá territories. By tracing the intricacies of the juridical treatment of indigenous identity, land and civil rights, I'm seeking to demonstrate the complexity of the interplay of law, legal procedure and the public enactment of justice and "justness" in the case of the Tupinambá. Drawing on, on the one hand, Geertz's rather "interpretative" or "hermeneutical" and, on the other hand, Bourdieu's rather "functionalist" approach to the nature of law and jurisdiction, I will then try to "make sense" of the Tupinambás' juridical experience from a perspective that gives priority to the dynamics of proceedings over legal texts or the process of law making. Eventually, I will suggest that the legal battle which involves Tupinambá Indians, estate owners, the Federal Police, the Federal Prosecutor's Office and a number of public authorities, and which is fought out in a seemingly interminable juridical back and forth between first instance courts, courts of appeal and, recently, the country's Supreme Court, is not only a paradigm of the difficulties of juridical resolution of social conflicts, but constitutes, in itself, a performative "enactment" of societal disputes that go well beyond the Tupinambá's particular case.

The local office of FUNAI in the city of Ilhéus (home to Brazil's probably best known writer, Jorge Amado), as a matter of fact, although unwillingly, does issue certain types of documents related to the question of the "Indianness" of the petitioner. Such documents are sometimes required by public institutions such as universities, as indigenous applicants may benefit from special admission quotas, like students of Afro-Brazilian origin. Although the Convention No. 169 (Art. 1.2) of the International Labour Organization, ratified by Brazil in 2002, as well as a recently promulgated federal Brazilian law on university quotas,² relies on the principle of "self-identification" or "self-declaration", on a more local "scale" of mapping of indigenous rights – to borrow an image from the Portuguese legal sociologist Boaventura de Sousa Santos (1987) – things work differently. Candidates for the Federal University of Bahia (UFBA), for instance, have to provide *proof* of their "condition" of Indianness, "by means of a certificate of [...] FUNAI" (UFBA 2014: Art. 6.1) when applying for one of the

two extra places for “indigenous villagers” (*índios aldeados*).³ Ringing up UFBA’s “Pro-rectorate for Affirmative Actions and Assistance to Students”⁴ (PROAE) in late 2014, I was informed that to apply as an indigenous student to one of the “Perseverance” fellowships,⁵ one would have to produce an auto-declaration *and* a FUNAI certificate – although the corresponding decree lists these documents as alternatives (MEC 2013: Anexo I.II).

This is just one example of the increasing bureaucratization of indigenous lives I was witnessing during my fieldwork in Ilhéus, Bahia. Whereas Brazilian law endorses the principle of indigenous self-identification, local government agencies often prefer to rely on “hetero”-identification or *ascribed* identity. Indigenous people see themselves as constantly obliged to “prove” their Indianness, be it when applying for a place at university, a job as an (indigenous) school teacher or a pension as an (indigenous) rural worker. The requirement of such evidence of identity is often extralegal, even if the Brazilian Supreme Court (STF) in 2012 confirmed the constitutionality of both the principle of “hetero-” and auto-identification (STF 2012: 37f). Moreover, FUNAI officials have become wary of the danger of acting as, or being considered to be acting as, a kind of “certification authority” for indigenous identity. FUNAI servants in Ilhéus, for instance, had to report to the Federal Police, as a consequence of alleged pension scheme frauds in which FUNAI declarations were part of the indigenous applicant’s file. As a consequence, the certificates issued by FUNAI Ilhéus have undergone frequent revisions. The one for “educational purposes”, at the time of my fieldwork in Ilhéus, was basically not certifying anything of itself, but merely confirming, in a nearly unintelligible multi-clause sentence, that “according to the declaration of the *cacique*” and that of another “four community leaders”, the person concerned would be a Tupinambá Indian, living at this or that place. As one of the officials joked, this latest version of the certificate would hopefully prevent them from being prosecuted by the Federal Police as a *quadrilha* (criminal organization).

The making and unmaking of Indianness

The question of who is, and who is not, a “legitimate” Indian⁶ has become a matter of public concern in Brazil. Especially (but not exclusively) in the country’s north-east, home to many of the country’s indigenous groups that have only relatively recently managed to successfully reaffirm and reclaim their indigenous identity and rights (see, for instance, Oliveira 2004), interest groups linked to the country’s thriving agribusiness have managed to put the “indigenous question” on the front line of the political agenda and public media discourses. Media reports on alleged “bogus” Indians often go hand in hand with accusations that FUNAI

and anthropologists are complacent accomplices in the “making up” of indigenous people, in places where, in reality, there would only be farm workers of mixed descent who had long abandoned their “original” Amerindian culture. A very contemporary example of the innumerable communication media that draw upon this “bogus Indian” discourse is the infamous (among anthropologists) web log *Questão Indígena* (Indigenous Question) which, to cite just one of the many posts that question the legitimacy of the Tupinambá’s ethnic identity, has recently reported on the occupation of a *fazenda* (country estate) by Tupinambá Indians by saying that:

Around 100 Afro-Descendants who adopted indigenous identity to claim other people’s lands in southern Bahia once again occupied *fazendas* in the region of Ilhéus and Olivença. The areas had already been invaded, but the Federal Police removed the indigenoids [*indigenóides*] by virtue of eviction orders. According to the “cacique” Sinval Tupinambá, one of the group’s leaders, [the Indians] discovered that the judiciary had suspended the eviction orders and therefore decided to newly occupy the *fazendas*.⁷

Tellingly, the blog’s corresponding Facebook page uses as its profile picture a drawing of a white man holding a mask in front of his face, which supposedly turns him into an Indian.⁸ Popular magazines like *Época* or *Veja*, available nationwide, take a similar line. Media reports from *Veja* or *Época* have not only exerted significant influence on the Brazilian middle class’s assessment of the indigenous “question” but, interestingly, also found its way into the records of legal cases. In one of the possessory lawsuits filed at the Court of Federal Justice of Ilhéus (to which I will return later), for instance, the landowner, in a petition in which he questions the demarcation of “that newest Indigenous Reservation of 480 square kilometres [...] intended for the accommodation of pseudo-Indians Tupinambá who have never lived there”, annexes a report of *Veja* (Brazil’s biggest illustrated magazine) on the “Jamboree of opportunist anthropology” (2010) as evidence for his deliberations.⁹ An article headlined “Lampião Tupinambá” (which could be translated as “Billy the Kid Tupinambá”)¹⁰ from the magazine *Época* (edited by Latin America’s largest mass media group Globo), in turn, is cited by the federal judge of another possessory action as documentary evidence for the “notoriety” of land occupations by indigenous groups in southern Bahia.¹¹ In the *Época* article cited by the judge, Babau (the *cacique* of the indigtees) features as “one of the leaders of a group of 3,000 individuals who name themselves Tupinambá” and who, “together with his band” supposedly had “invaded” more than 20 *fazendas* in the area.

As Brazil’s constitution of 1988 guarantees extensive rights to the country’s indigenous population (which have only been partly and often unwillingly implemented by the successive post-military governments), to deny indigenous people their Indianness altogether has become

the core strategy of stakeholders who see their own – mostly economic – interests endangered by claims based on these rights. In yet another possessory action against the “Indigenous Tupinambá community of Olivença”, the plaintiff characterizes the defending party as “invaders, tagged as ‘Indians’, who get together, dress their heads with plumage, daub their bodies with paint [and] invade private properties [...]”. In the same case, the federal judge of the court of first instance even falls back on the travelogues of the German Prince Maximilian of Wied-Neuwied to argue against the Indianness of the defendants. Wied-Neuwied had visited the Jesuit Indian Mission of Olivença near Ilhéus during his expedition to Brazil in 1815–17. In the account of his journey, Wied-Neuwied (1820: 82) expresses his regrets on the fact that the “dark skinned Indians” he caught sight of on the beach of Olivença did not entirely equal the Tupinambá he had read about in Lery’s *Histoire d’un voyage fait en la terre du Brésil*, published more than 200 years before (in 1578). The federal judge of Ilhéus, in his judgment dating from early 2012, willingly embraces Wied-Neuwied’s chagrin, citing the prince’s deliberations for over a page as evidence for the fact that “already at that time [the Tupinambá Indians] dressed, spoke, worked and behaved like people that had integrated into the culture of the White”.¹² Wied-Neuwied’s remark that the indigenous people he met in Olivença had “unfortunately lost their original characteristics” and his frustration at “not seeing a Tupinambá-warrior approaching” are both reproduced in bold print in the judge’s statement (*ibid.*).

The use of ethnic belonging (and its denial) for the purpose of settling more or less local conflicts of interests is of course not exclusive to Brazil’s so-called “cocoa coast” (before the Second World War, the region around Ilhéus was one of the world’s biggest cocoa producers). Comaroff and Comaroff (2009), for instance, have assembled a minute account of the uses of ethnicity in what they call the “lawfare” of (and against) indigenous people in North America and Southern Africa. In what concerns the village of Olivença and its Tupinambá inhabitants, Marcis (2004) points to the long history of indigenous resistance against their cultural and physical extermination by colonial and postcolonial Brazilian society, emphasizing the importance of concepts of ethnicity in the constant struggles between the native inhabitants and the white elite from Ilhéus. After the foundation of Vila Nova de Olivença by Royal Charter in 1758:

Affirmation of their ethnic identity turned out to be fundamental to the indigenous population for the preservation of their lands, costumes and culture, as, to the extent that the [indigenous] groups became more dependent on dominant society, colonizers and authorities declared them to already be “civilized”. Thus confounded with the other inhabitants [of Olivença], the Indians would lose their rights to the lands of the

[former] missionary settlements, which would be converted into common lands [and consequently] split up into parcels to be redistributed among [Indian] descendants and other interested parties. (Marcis 2004: 56)

However, at that time, the Indianness of its inhabitants was not only decisive for the native population of Olivença, but also for the white elite from Ilhéus who had started to establish itself in the Vila, after the extinction of the Jesuit mission. As Marcis relates, “the indigenous condition of the Vila became a double-sided prerogative: it was negated, on the one hand, in consequence of the extinction of the mission, but it guaranteed, on the other hand, the very existence of the Vila as a[n independent] political and administrative unity” (2004: 69f). Even though the *Alvará Régia* of 1680 and the Land Tenure Act of 1850 guaranteed, in principle, to the indigenous population preferential rights over the lands they possessed (either as successors of the Jesuit mission or as its primary occupants), in practice, these rights were “constantly violated by private individuals and authorities” (see Marcis 2004: 56, 67, 69). As soon as the ethnic identity of the primary inhabitants of Olivença ceased to work to the advantage of the local elite from Ilhéus, it became challenged altogether. Towards the end of the 19th century, Vila de Olivença was “administratively declared ‘extinct’, for [an alleged] lack of any sign of proper ‘indigenous’ life among its inhabitants” (Viegas 2007: 18).

This very brief account of the history of Olivença, at the present-day gateway to the, fiercely disputed and still not demarcated, Indigenous Territory Tupinambá de Olivença, may give an idea of the perpetual historical need of the indigenous population to aver its ethnic identity. The fact that Brazil’s Indians, in what concerns the imperative of permanent vindication of their ethnic belonging, find themselves in almost the same situation today as during the preceding centuries, is related to a, for a long time dominant, political (and juridical) understanding that the “indigenous question”, given time, would sort out itself through the “integration” of all indigenous people into Brazilian society as a whole. One can trace this concept from the *Diretório dos Índios* (a royal law conceived by the Marquis of Pombal in 1755) down to the *Estatuto do Índio* (Statute of Indians) of 1973, a law still in force, even if partly rendered obsolete by Brazil’s constitution of 1988. Quite modern in its definition of indigenous identity in near Barthian terms (“persons of pre-Colombian origin or descent who identify themselves and are identified as belonging to an ethnic group whose cultural characteristics distinguish them from society as a whole”), the *Estatuto do Índio* leaves no doubt that Indianness is a condition to be considered temporary. As laid down in its very first article, it is the purpose of the statute to not only protect Brazil’s indigenous population, but also “to integrate them, gradually and harmoniously, into the national community”.¹³

The tortoise and the hare

Unexpectedly, to the legislator of the early 1970s, the contrary has happened. The Brazilian Institute for Statistics, which included the category “indigenous” in its population census from 1991 on, reports for the year 2000 “a demographic growth above all expectations from 294,000 to 734,000 individuals in only nine years”.¹⁴ In rural north-eastern Brazil, the number of people who declared themselves *indígena* rose more than 58% from the census of 2000 to the most recent one of 2010 (IBGE 2012: 12).¹⁵ Naturally, the growth of the indigenous population in rural areas has also heated up Brazil’s festering land-use conflicts, currently pitching against each other first and foremost the country’s *agronegócio* (agribusiness) and the inhabitants of indigenous territories in the process of legalization as indigenous reservations.

The process of recognition of the indigenous reservation Terra Indígena Tupinambá de Olivença (TI Tupinambá) became official only in 2001 as a result of an (internal) FUNAI report on a research mission carried out in the district of Olivença “for the purpose of collecting data on the land claims of the Tupinambá Indians” (Paula 2001). Nearly a decade later, with the approval of the final report for the delimitation of the TI Tupinambá by the president of FUNAI in 2009 and its subsequent publication (DOU 74/2009), the proposed reservation completed the second most important stage of its legalization. Since then, it has been awaiting its official creation by means of a declaration by the Minister of Justice. According to the decree that regulates the demarcation of indigenous reservations, the Brazilian Ministry of Justice is legally responsible to take a final decision within a maximum of six months after the publication of the delimitation report.¹⁶

To pressure FUNAI and the Ministry of Justice to carry out their administrative duty in due time, the Tupinambá Indians eventually began to occupy several of the *fazendas* situated within the limits of their proposed Indigenous Reservation (see Magalhães 2010; Alarcon 2013).¹⁷ The proprietors – most of whom hold legal land titles issued by the state government of Bahia – reacted by instituting proceedings, generally at the Court of Federal Justice of Ilhéus. At the time of writing, according to the federal judge who had taken office in early in 2014, there were well over a hundred possessory actions still to be decided on within his judicial district. The earliest proceedings I came upon during my fieldwork in Ilhéus in the same year (I was granted permission to scrutinize a dozen case files in detail without any restrictions) date from 2004, which is actually the year when the first occupations of *fazendas* (called *retomadas* by the indigenous population, that is, “recaptures” or reoccupations) took

place. However, the fact that most of the legal proceedings have been ongoing for more than a decade now is not necessarily due to the tardiness of Brazilian civil justice. To give an example, in a lawsuit concerning the *retomada* of an estate located in an area called Serra do Padeiro, at the western tip of the TI Tupinambá, filed in December 2004, there have been more than a dozen decisions of first instance, and the case register (available on the internet) meticulously lists around 400 entries recording petitions, summons, appeals, etc.¹⁸

The case is typical in its toing and froing from the court of Ilhéus to the Higher Regional Court in Brasília. At the same time, it is unique as regards the identity of the claimant, who is not, as is usual, the proprietor or holder of the land title, but the indigenous community of Serra do Padeiro itself. In the petition that institutes the proceedings, Babau, the already mentioned leader of the Comunidade Indígena Tupinambá Serra do Padeiro, claims that:

In view of the legislation in force and the legal opinions and decisions of the Higher Courts, the legitimate entitlement of the Tupinambá of Serra do Padeiro to the *fazenda*, which is being perturbed by the defendant party and out of which they are trying to expel [the claimants], proves to be unquestionable. Moreover, due to others' will, [the claimants] are subjected to humiliations and constant violence, confined within small areas bare of resources, hindered from making use of what belongs to them and what is warranted to them by the *Carta Magna*. This being the case, nothing else remains to be done than to resort to the judiciary. The people of the Tupinambá village of Serra do Padeiro can only hope that justice prevails and peace will be re-established, if late, after nearly 400 years of massacres and injustice. For hundreds of years, the great nation of Tupinambá from the village of Serra do Padeiro is crying and waiting for JUSTICE!

Babau's deliberations are testimony to the Tupinambás' growing collective awareness of their rights as an indigenous people – a process that can be traced back to the late 1990s, though there had been various movements of resistance against indigenous disenfranchisement before then (see Paraiso 1987; 2009). The plaint of the Indians of Serra do Padeiro is also paradigmatic as to what constitutes the crux of all possessory actions: to decide which of the opposing parties has the “better” right of possession. While the Tupinambá of Serra do Padeiro claim that they are being hindered, by the defendant, from making use of the lands that belong to them by virtue of the Brazilian constitution, the defendant – acting as the plaintiff in an action regarding the same *fazenda*, filed by him two weeks after the Indians – asserts that it is he who should be considered a victim of disturbance of possession.¹⁹

To understand the devious routes of the possessory actions regarding the TI Tupinambá (as those regarding many other indigenous regions throughout Brazil), it is worthwhile briefly to go back in time not just to the beginnings of Brazil's colonization (the Jesuit village of Olivença was part of the Captaincy of São Jorge dos Ilhéus, donated in 1534), but to the days

of Ancient Rome. Modern European civil law owes a lot to Justinian's *Corpus Juris Civilis*, a legacy which is also very present in the Brazilian *Código Civil* of 2002 (which goes back to a draft from 1975), and which draws the same clear line between *posse* (possession) and *propriedade* (ownership) – a distinction which gradually emerged in the course of history of the Roman Republic. The legal concept of “possession” originated initially in connection with public lands, which were given out to individuals during the expansion of the Roman Empire, not as owners, but as possessors (Mousourakis 2012: 157). As Kaser notes, earlier in Roman history, the distinction between “ownership” and “possession” had still not taken shape:

Generally speaking, in ancient Roman conception the relations between people and things is never understood from a merely proprietary perspective, that is, things are not considered assets at one's free disposal. To the contrary, particularly in what concerns rural estate, the farm, with its living and lifeless stock, the awareness prevails that this epitome of material goods constitutes the basis of existence of the family, ensuring its future. This implies multifarious moral and legal commitments which limit its legal dominion [...]. As a consequence of this very conception, the [peasant's] house and fields enjoy sacral protection. Our present-day notion of property [...] is only the result of a long development. [...] Ancient Roman property, in contrast, was not yet dissociated sharply from possession. (Kaser 1955: 105)

As “ownership”, based on legal entitlement, gradually differentiated itself from “possession”, that is, the factual control of a thing (or a piece of land), it became ever more important to provide legal means of protecting possession, as securing one's right of property (through a *vindicatio*) demanded proof of ownership. This, however, “would in principle require [the owner] to prove that the person from whom he had acquired the thing was then its owner. That of course would turn on whether that person had acquired from the person who was then the owner; and so on *ad infinitum*” (Johnston 1999: 55). The possessory *interdicta* was held out to solve this problem: “In comparison with the regular proceedings of *actiones*, they held the advantage of tightness and swiftness, which was given also to all the other interdicts, owing to their administrative public law character” (Kaser 1955: 325).

So far, so good. The trouble is that, be it in Ancient Rome or in modern Brazil, even interdicts cannot exclusively rely on the factuality of possession. Even the *interdictas*, Kaser cautions, “only provided relative protection, they decided in favour of the party with the ‘better’ possession than the adverse party. The possession was considered ‘worse’ if the adverse party had obtained it in a defective way, namely by force, clandestinely or by grant at will” (1955: 123). Similarly, Article 922 of the Brazilian Code of Civil Procedure gives formal expression to the relativity of all *ações possessórias*: “It is admissible that the defendant, alleging that he was infringed in his possession, [himself] demands possessory

action [...]”. And, not much different from Roman law, the Civil Code declares: “It is *just* the possession which is not forcible, clandestine or precarious” (Art. 1200, emphasis added).

Before taking a closer look at the manner with which the Brazilian judiciary has been dealing with question of “possession” in the case of the territories disputed by the Tupinambá Indians, it is worth pointing out another commonality between ancient European and modern Brazilian rural society, in what refers to differing concepts underlying the use of land. To the indigenous population currently living within the limits of the not-yet-declared TI Tupinambá, the *meaning* of land is still very different from that ascribed to it by many of their legal opponents. Various scholars have pointed to the prevalent Tupinambá notion of land not as a good or property, but a “place where existence materializes” (Lara 2012: 56). Kaser’s (1955: 105) reference to the “moral commitments” attached to “things” (including land) and the “sacral protection” a peasant’s house and lands enjoyed – not as property, but as sources of family life – matches, for instance, with Viegas’ observation of the Tupinambás’ “total identification of a person and their house”, a relation “which is not mediated by a relation of alienable property [...] but by bonds of personal responsibility” (Viegas 2007: 86). Viegas thus attributes part of the Tupinambás’ massive land losses from the 1940s to 1960s – when many Indians sold or bartered their land possessions to cacao farmers from Ilhéus for “a bottle of *cachaça* [rum]” or to clear their debts – to what she terms “equivocal compatibilities” (2007: 265). Pieces of land that, within indigenous reasoning, were seen as areas that only potentially would turn into a *lugar*, a place where families would exist and subsist – within the Tupinambá’s conception of life as an interminable “circle of abandonment/revitalization” (2007: 266) – to their trade “partners” from the city of Ilhéus was *terreno*, real property that could be, and demanded to be, the object of ownership, independent of its actual use.

The same diverging notions of land were prominent in the courtroom of the Court of Federal Justice of Ilhéus, in 2014. Unlike his predecessors, who regularly had seen no necessity to hear the indigenous defendants of the possessory actions filed by *fazendeiros* (estate owners), the newly arrived judge, in an attempt to “pour oil on troubled waters”, as he called it, endeavoured to achieve temporary settlements between the opposing parties, until a final decision as to the demarcation of the reservation would be taken by the Ministry of Justice. Unexpectedly, indigenous peasants and title-holding estate owners were thus forced to sit together, discussing their different points of view regarding the disputed lands. While the judged managed to induce the opposing parties to compromise in numerous actions, it also became clear how different their demands actually were. The proprietors (who often did not live on their estates but entrusted the agricultural work to an administrator and/or a reduced

number of agricultural labourers) were eager to detail the economic losses they had suffered in the wake of the *retomadas*. Explaining the troubles of “professional” agriculture, one of the estate owners came to admire “how the Indians actually manage to survive” on her farm. On the other side, in the same case, the Tupinambá made a point of explaining how the fields they were tilling for subsistence agriculture provided for so and so many families, and that their main concern would be “to have land that really belongs to us”. The judge’s proposal that the indigenous occupants, for the time being, should work as paid labourers on the occupied *fazenda*, while it would still legally be possessed by the non-Indian proprietor, was hence categorically rejected by one of the responsible *caciques*: “We may withdraw from the land if necessary, but work on it as employees, never!”

Law, law enforcement and law suits as acts of social sense-making

But what about the question of the “justness” of the possession of either the Tupinambá or the title-holding *fazendeiros*? Putting aside, for the moment, the problem of “material” justness, that is, the fairness of the Tupinambá’s demand to be allowed to inhabit the territories that had belonged to them, as a dynamic ethnic group, for centuries, the problem of “formal” legal justness of either party’s possession is juridically rather intricate. According to its (post-dictatorship) constitution of 1988, the Federative Republic of Brazil “recognizes the Indians’ [...] primordial rights over the lands they traditionally occupy” (CF 1988: Art. 231). The indigenous population, though, is not the proprietor of these lands – which legally belong to the Federation (Art. 20/XI) – but enjoys the right of their “permanent possession” (Art. 231§3). Moreover, the constitution declares all indigenous lands to be “inalienable and inviolable, and the rights over them irrevocable” (Art. 231§4). To an advocate of indigenous rights, these lines of the Brazilian constitution must sound quite utopian, especially if compared to the situation of indigenous people in other continents (like Australia). For many indigenous people in Brazil though, the full implementation of their constitutional rights is rather part of a Utopia that has yet to develop. The period of five years allotted for the demarcation of all the country’s indigenous reservations (ADCT 1988: Art. 67) has long passed, and political movements to severely limit precisely these constitutional rights have gained force in the meantime.²⁰

As mentioned, most of the *fazendeiros* within the TI Tupinambá do in fact hold legal titles for their estates, issued either by the state of Bahia or even the federal government. Formally, this fact itself does not undermine the Tupinambás’ demands: the constitution determines explicitly that all such titles are to be considered “null and void, not producing any legal

effect” (Art. 231§6) – although, in the case of the neighbouring Pataxó Hã-Hã-Hãe Indians, it took the STF 30 years to finally recognize that (see Zoettl 2016). At the same time, within possessory actions, the question of ownership is irrelevant altogether, as their purpose as a legal remedy is to protect the factuality of a given instance of the exercise of power over a certain “thing”. On these grounds, the Tupinambás’ argument that the lands they had *re*-taken actually belong to *them* by act of the constitution, has regularly been rejected by the courts of first instance. As the new judge of Ilhéus wrote, shortly after taking office and probably still under the influence of his local juridical assessors, as a representative of the Federal Prosecutor’s Office (MPF) speculated, “what is being discussed in the present possessory action is not the demarcation of the Tupinambás’ lands [...]. As long as the Indigenous Territory is not yet delimited, the possession has to be safeguarded of whoever is effectively exercising it.”²¹

To cut a long story short, it suffices to note here that the legal interpretation of the question of indigenous possession, as opposed to the possessory rights of the *fazendeiros* is not only complex but, like most points of law, subject to differing interpretation. As opposed to the cited judge’s opinion, FUNAI, MPF and the legal representatives of the federal government (all of them responsible, according to the constitution, for defending the legal interests of Brazil’s indigenous population), regularly defend the primacy of indigenous possession over the private possession conceded by the Civil Code. Taking up their arguments, a federal judge from the neighbouring district of Itabuna, in another possessory action regarding the TI Tupinambá, considered that “be there or not occupation by private persons, indigenous people regularly do not lose their possession of an area, as it is ‘permanent’, a characteristic which detaches it from the civil/private regime of possession”.²² Accordingly, the STF has repeatedly clarified that the constitutional right of indigenous possession does not depend on its administrative demarcation, which is to be considered a merely “declaratory” act (STF 2010: 237).

Reflecting on the above mentioned lawsuit of the Pataxó Hã-Hã-Hãe Indians at the STF (which ended in 2012 with a long-awaited victory for the indigenous population of the TI Caramuru-Paraguaçu), I argued that the court proceedings, publicly re-enacting the “drama” of the Hã-Hã-Hãe, and themselves drawing on dramatic forms of representation, could be interpreted, in (Victor) Turnerian terms, as a “cultural performance” which stages, in the court’s plenary hall, a variety of social conflicts inherent in modern Brazilian society (Zoettl 2016). The “lawfare” of and against the Tupinambá Indians, at its present stage, differs from that of the Hã-Hã-Hãe though, in that it has not yet reached, as far as its legal side is

concerned, the publicity and public visibility of the widely noticed “final battle” of its *parentes* (kin) from Caramuru-Paraguaçu, less than 100 km away. Apart from a single judge decision on the part of Joaquim Barbosa, then president of the STF until his early retirement in 2014, which suspended more than a dozen eviction orders,²³ the great majority of lawsuits concerning Tupinambá are processed in a tiny room in the Federal Court of Ilhéus, hardly noticed by the general public.

What becomes publicly known, through media coverage on an often nationwide level, are the frequent actions of the Federal Police against individual Tupinambá Indians or the forced evictions of whole Tupinambá villages. Babau, the *cacique* from Serra do Padeiro, has been repeatedly arrested on dubious grounds by the State Police (*polícia militar*) or local agents of the Federal Police, put into custody by means of local courts’ decisions, yet regularly released on the grounds of habeas corpus by the higher courts. The writs that have come to Babau’s aid – if sometimes after he had already spent months behind bars – are occasionally full of comments that show how disconcerted the higher judges are by the *modus operandi* of the lower courts and the police: “the person concerned [*o paciente*] was detained only seven months after obtaining the arrest warrant”, “[he] has been imprisoned for 90 days without any notice of formalization of the complaint”, “the Federal Prosecutor’s Office [MPF] itself, in the trial of first instance [...] pleaded against [his] imprisonment”, “the decision of the court of first instance which ordered the remand in custody hardly refers to the person concerned, limiting itself to referring to statements of unknown witnesses”, “the access to these statements, surprisingly, was restricted to the police authorities and the prosecution, excluding the defence”, etc.²⁴

Clifford Geertz has advocated a “hermeneutic” perspective on law, which would seek to transcend functionalist approaches that interpret law as either “a clever device to keep people from tearing one another limb from limb, advance the interests of the dominant classes, [or] defend the rights of the weak against the predations of the strong [...]” (1983: 232). Thinking of the Tupinambá case, it sometimes seems difficult *not* to interpret law, legal procedure and the action of judges and law enforcement officers as a device to maintain a certain political, economic and historic situation literally *in statu quo res erant ante bellum*. The persecution of the people who identify themselves today as Tupinambá has run through the centuries, and has usually been administered through close cooperation between the local elite, personified by the so-called *Coronéis do Cacau* (cocoa colonels), local and state government agents, the judiciary and the police. After what became known as the revolt of “*caboclo*” Marcellino in the 1930s (an uprising against the construction of a bridge over the River Cururupe to

facilitate access from Ilhéus to the indigenous territories near Olivença), it looked as if the remaining population's resistance had finally been broken. Marcellino, vilified by the press as "*Lampião Mirim*" ("the tiny bandit"), charged by the judiciary with crimes as diverse as murder, defloration or "being communist", hunted first by the police of Ilhéus and later by Bahian government troops, eventually disappeared under suspicious circumstances around 1937; many of his indigenous companions were subjected to torture during the pursuit (see Alarcon 2013; Paraiso 1987; 2009).

Half a century later, the Bahian historian Maria Hilda Paraiso (1987: 105) observed that "[o]nly now, in 1984, can we notice a recommencement of a movement that aims to recover the [Tupinambás'] lands and their recognition by the state's Bureau [of Indian Affairs]". The indigenous population's "gatherings during which they seek to strengthen their ties of solidarity and revive their cultural practices", Paraiso went on, "have already provoked reactions from the residents of Ilhéus and Olivença, including criminal complaints at the Federal Police" (1987: 105). A brief look into the report of the "Special Commission on Tupinambá" of the National Council for the Defence of Human Rights (CDDPH), instituted to "map the police investigations, administrative procedures and judicial processes which involve indigenous leaders",²⁵ gives an idea of how local and federal institutions continue, another 25 years after this latest resurgence of the Tupinambá movement, to work hand in hand to undermine the Tupinambás' efforts to actualize their constitutional rights. To cite just one example, under the chapter heading "History of violence against and imprisonment of Tupinambá leaders", the report lists, for 23 October 2008, the following incident:

Police operation in the village of Serra do Padeiro, with more than 130 police officers, 2 helicopters and 30 vehicles – including funeral cars – to execute judicial eviction orders which had been suspended by the TRF of the First Region [regional appeal court] and against the advice of the Ministry of Justice, resulting in 22 indigenous people injured by rubber bullets and intoxications by bombs and gas, destruction of houses, community vehicles, food and school equipment. The officers of the Federal Police took away spears, clubs, arrows and burned headdresses, breechcloths, maracas, in short, indigenous attire, in flagrant violation of the cultural rights of the Tupinambá, an indictable offence according to law 6001/73. (CDDPH 2011: 35)

In what way could the anthropologist endeavour to make sense, in Geertzian terms, of such a blatant persecution of an ethnic minority in the 21st century in a democracy, albeit a young one? Are the bureaucratization of indigenous identity, the judicialization of indigenous rights and lives and the criminalization of indigenous leaders and individuals by state agents and the judiciary not simply different aspects of what Bourdieu (1987: 838) has called (referring to law) an attempt to consecrate "the established order by consecrating the vision of that order which is held by the State"? Although such a way of looking at things may not be

completely wrong, it partly ignores the complex dynamics underlying the processes of making and applying the law, and the relation of these processes to the “bigger” dynamics of negotiation of societal interests. Even Bourdieu, who emphasizes predominantly the latent power of “symbolic domination” inherent in legal norms (1987: 846), does not refrain from pointing to the importance of law in the symbolic and actual brokering of social conflicts. While, at one point, Bourdieu exposes the arbitrariness of and the “rationalization process” behind legal reasoning, he also comes to consider judicial acts as representations of societal disputes. One could conceptualize trials, Bourdieu suggests, as the “paradigmatic staging of the symbolic struggle inherent in the social world: a struggle in which differing, indeed antagonistic world-views confront each other” (1987: 837). Within the same line of reasoning, Bourdieu describes the judiciary as “a specialized body [...] responsible for organizing the public representation of social conflicts according to established forms” (1987: 830f). Bourdieu’s sociology of the “juridical field” is thus not necessarily antagonistic to Geertz’s symbolic-interpretative view of law as being “constructive of social life not reflective, or anyway not just reflective” (1983: 218). But while Bourdieu does not refrain from denouncing legal procedure as a ritual “designed to intensify the authority of the act of interpretation” and the interpretation of law as a “symbolic struggle between professionals possessing unequal technical skills and social influence” (1987: 827), Geertz advocates a – perhaps more relativistic – view of law as “a distinctive manner of imagining the real” (1983: 173).

Both the meandering of the Tupinambá case through the various instances of the Brazilian judiciary, as much as the juridification (and criminalization) of indigenous identity itself are not bare of elements that recommend a Bourdieusian and/or Geertzian perspective on them to overcome a purely “instrumentalist” view (criticized by Bourdieu himself) of legal and state actors and actions as merely reflecting “existing social power relations” and the “interests of dominant groups” (1987: 814). As a matter of fact, the Tupinambá worldview and interests have not only been defended, at great sacrifice, by the Tupinambá themselves and some of their allies (such as, for instance, the Conselho Indigenista Missionário), but also by various actors of the “judicial field”. The MPF of Ilhéus, for instance, has peremptorily refused to press charges against Indians for trespassing on land (*esbulho possessório*), arguing that the Tupinambá *retomadas* would be a legitimate part of their struggle (cf. Alarcon 2013: 69). Many preliminary first instance eviction orders have been suspended by the higher courts, occasionally on the grounds of a remarkably insightful argumentation. The presiding judge of the Tribunal Regional Federal of the First Region (TRF1), for instance, in a decision taken the day before the execution of the contested eviction order, deemed that the first instance

decision to concede such an order “by way of preliminary injunction, that is, without exhaustive analysis of the *causa*” – the usual processual form taken in all possessory actions against the Tupinambá – would be “precipitant and imprudent”; all the more so as “the execution of the decision [...] may pose a serious risk to the security of the Tupinambá indigenous community and the police agents.”²⁶ In the already cited decision of the constitutional court, Joaquim Barbosa, at that time Brazil’s most senior judge, cautioned against the fact that “in most cases, the eviction of occupants does not involve any prospect of dignified [future] accommodation” and ruled that “to avoid the constant and involuntary relocation of the population” was a “precaution as important as that of securing the duly execution of judicial injunctions”.²⁷ In view of the persecution of Tupinambá Indians by state agents, the MPF of Ilhéus has recently filed a civil action claiming that the Brazilian state should pay R\$500,000 (around US\$200,000) to the Tupinambá community for “acts of violence and torture” perpetrated by Federal Police agents during criminal “investigations” at a *retomada* during which, according to the MPF, indigenous activists were tortured by means of Taser weapons.²⁸ As for the attacks on indigenous rights by the media, the MPF of São Paulo has filed a civil action against the publisher of *Veja* magazine for defamation (*dano moral*) of indigenous (and black rural) communities in the already cited article on the “Jamboree of opportunist anthropology”.²⁹ Then again, with respect to the erratic bureaucratization of indigenous lives, the MPF of Roraima (a state at the northern tip of Brazil) has filed a civil action regarding the university’s non-acceptance of indigenous self-identification for fellowships.³⁰

The symbolic struggle Bourdieu identifies in the proceedings of the different legal actors is however, at least as far as the legal treatment of indigenous lives in Brazil is concerned, less a question of differences in technical skills and social influences than, more generally, shifting societal paradigms that make certain judgments, at a certain point in history, socially “acceptable” or not. To give an example from another legal domain, Brazil has recently witnessed an unprecedented and widely unexpected crackdown on politico-economical corruption, spearheaded by federal and constitutional judges, the Federal Prosecutor’s Office and the Federal Police. A number of the highest-ranking officials of the ruling Partido dos Trabalhadores (PT) have been convicted in 2013 by the STF and given prison sentences without parole for their involvement in a congressional vote-buying system which became famous as the *mensalão* (“big monthly allowance”). At the end of 2014, the Federal Police jailed a number of highest-ranking members of the executive boards of some of the country’s biggest companies in an operation named “*Lava jato*” (“car wash”), following a judicial

inquiry which disclosed a multi-billion dollar corruption scheme within the state-owned energy corporation Petrobras; in March 2015 the STF authorized criminal investigations against 34 members of the National Congress, including the presidents of the Federal Senate and the Congress, for suspicion of complicity and passive corruption.

Regarding indigenous rights, though, some of the STF's very recent decisions seem to indicate a further paradigm shift, which could prove particularly unfavourable to those indigenous groups who are still struggling to see their traditional territories demarcated. In late 2014, the second chamber of the STF overruled a decision of the highest non-constitutional court (STJ) on the grounds that only those territories could be demarcated which had been occupied by indigenous people on the very day of the promulgation of the country's actual constitution (of 5 October 1988) – no matter by what means the indigenous inhabitants had been driven out of their territories, and even if this had occurred only the day before – thus categorically dismissing the rights conferred on them by virtue of Brazil's earlier constitutions.³¹

The STF's changing juridical stances, of course, also reflect changes of the political balance of power (not necessarily related to this or that ruling party, but often rather to the shifting influence certain lobby groups enjoy within the governing coalition) – not least because the judges of the STF are nominated by the President in office. At the same time, Brazil's supreme court has never denied its political responsibility, in the sense of assuming and acknowledging its role as a kind of final referee for a near indefinite variety of social disputes (see Paixão 2007). This political side of judicial reasoning frequently shines through the lines of the published grounds for the court's decisions as, for instance, when one of the judges of the above cited decision “initiate[s] [her] vote with the disquiet of being aware of the difficulty of finding, judicially, a solution that attends equally to the anxieties of the indigenous community which has long since been dispossessed of their lands, and the farmer determined to work for the country's inland development [...]”.³²

The (alleged) antagonism between indigenous minorities' rights and the “national” interest of the country's economic development has indeed become, for the moment, the way Brazil's indigenous question is predominantly “imagined” within public discourse. This not only includes the – mostly biased – media coverage of “clashes” between indigenous peasants and (supposedly small-scale) agriculturalists, but also, and not necessarily in a biased way, the “juridical field”. One may lament this (hopefully fugacious) paradigm which reduces a socio-cultural issue to one of mostly “late liberalist” (Povinelli 2011) economics – a perspective

against which one of the STF's ministers had actually cautioned in another recent key decision.³³ It nevertheless represents both, in Geertz's words, a "mode of giving particular sense to particular things in particular places" and a "set of practical attitudes toward the management of controversy" (1983: 232, 184).

Geertz's hermeneutic view of law would be stretched to its limits, though, if it had to make allowance for even for those manoeuvres of state power that seek to suspend the action of law altogether. Brazil's military dictatorship has bequeathed the country a cunning legal remedy called *suspensão de segurança* ("suspension of security") that allows public legal entities to plead to the higher court's president for the suspension, by simple order, of any previous court decision, by alleging that it would do "severe damage to public order, health, security or economy".³⁴ The "suspension of security" has been and is being amply used by Brazil's present government to push through large-scale construction projects that jeopardize the cultural and physical existence of various indigenous tribes in the country's north. Several court decisions, for instance, that suspended the construction of Belo Monte Dam on the Xingu River in the state of Pará on the grounds of gross procedural errors (such as lack of prior consultation of the indigenous communities, illegality of the environmental impact statement, etc.), have themselves been suspended – without considering the substance of the case – by means of an order of "suspension of security", in what one of the MPF's public prosecutors from Pará has called a suspension of legal order itself (Santi and Brum 2014).

"In the modern era," observes Boaventura de Sousa Santos, "law has become the privileged way of imagining, representing, and distorting, that is to say, of mapping" of social spaces (1987: 286). While the Tupinambá at least won't see their traditional territories flooded for the benefit of "national economy" (represented at Belo Monte, as it happens, by a consortium of some of Brazil's biggest private companies, some of which are currently being investigated for their participation in the "car wash" corruption scheme), they still struggle to be allowed to make use of what is theirs by virtue of the country's constitution. Much more than written law itself, it is legal procedure that has become the script for the public assessment of the Tupinambás' (and other Indians') demands, and their very right to exist within Brazilian society at large – a script written dynamically by a multitude of different judicial actors proposing, to the Brazilian public, a multitude of different ways of "imagining" the country's contemporary and future social reality. However, as the acts of the "judicial field" depend not only on the intrinsic "rules of the game" of judicial procedure but also on the legitimacy ascribed to them a priori and a posteriori by society at large, it is, ultimately,

the Brazilian public itself that will have to decide on the “just” interpretation of the “indigenous question”, as laid before them by the country’s judiciary.

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- ² Lei. (12.711/2012) Lei nº 12.711, de 29 de agosto de 2012. *Dispõe sobre o ingresso nas universidades federais e nas instituições federais de ensino técnico de nível médio e dá outras providências*. Brasília: Presidência da República. Lei. (12.711/2012) Lei nº 12.711, de 29 de agosto de 2012. *Dispõe sobre o ingresso nas universidades federais e nas instituições federais de ensino técnico de nível médio e dá outras providências*. Brasília: Presidência da República. Lei 12.711/2012: Art. 3
- ³ All quotes originally in Portuguese have been translated by the author, unless otherwise stated. Applicants for the regular 43% quota for “blacks, dark-skinned [*pardo*] or indigenous” students do not have to produce proof of their declared ethnic belonging. The same applies to applicants for the 2% quota for students of indigenous descent that do not claim to live in an indigenous village (UFBA 03/2012).
- ⁴ Pró-Reitoria de Ações Afirmativas e Assistência Estudantil; <https://sisper.ufba.br/sisper/Welcome.do>, accessed 17 November 2017.
- ⁵ Programa Bolsa Permanência, see: <https://www.ufba.br/noticias/programa-bolsa-perman%C3%Aancia-abre-inscri%C3%A7%C3%A3o-para-estudantes>, accessed 17 November 2017.
- ⁶ The terms “Indian” and “indigenous” are used interchangeably throughout the article as indigenous people in Brazil usually refer to themselves as “Indians” (*índios*).
- ⁷ Post of 4 August 2014, see: <http://www.questaoindigena.org/2014/08/efeito-joaquim-barbosa-milicia.html>, accessed 17 December 2014.
- ⁸ See: <https://www.facebook.com/pages/Quest%C3%A3o-Ind%C3%ADgena/289627421163847>.
- ⁹ To protect the privacy of the involved parties, references to legal proceeding will only be given for publicly available decisions and sentences.
- ¹⁰ Lampião is the name of a famous bandit from the Brazilian north-east of the early 20th century.
- ¹¹ TRF1 Ilhéus, process 0000629-19.2008.4.01.3301, decision of 4 February 2011.
- ¹² TRF1 Ilhéus, process 0000653-18.2006.4.01.3301, decision of 13 January 2012.
- ¹³ Lei. (6001/1973) Lei nº 6.001, de 19 de Dezembro de 1973. *Dispõe sobre o Estatuto do Índio*. Brasília: Presidência da República. Lei. (6001/1973) Lei nº 6.001, de 19 de Dezembro de 1973. *Dispõe sobre o Estatuto do Índio*. Brasília: Presidência da República. Lei 6001/1973: Art. 3.I, Art. 1.
- ¹⁴ See: <http://cod.ibge.gov.br/233E4>, accessed 17 November 2017.
- ¹⁵ I refrain here from discussing the reasons for the growth of the indigenous population, which is related both to “natural” growth and the increasing (re-)affirmation of ethnic identity in Brazil.
- ¹⁶ Decreto. (1.775/1996) *Dispõe sobre o procedimento administrativo de demarcação das terras indígenas e dá outras providências*. Brasília: Presidência da República. Decreto. (1.775/1996) *Dispõe sobre o procedimento administrativo de demarcação das terras indígenas e dá outras providências*. Brasília: Presidência da República. Decreto 1.775/1996: §§ 8-10.
- ¹⁷ See Alarcon (2013) also for a discussion of further motivations for the Tupinambá land occupations.
- ¹⁸ TRF1 Ilhéus, process 0002562-66.2004.4.01.3301.
- ¹⁹ TRF1 Ilhéus, process 0002708-10.2004.4.01.3301.
- ²⁰ See, for example, the proposition for constitutional amendment PEC (215/2000), which was about to be voted on by the Chamber of Deputies at the time of writing.
- ²¹ TRF1 Ilhéus, process 0000426-28.2006.4.01.3301, judgement of April 2014. The term “delimited” has probably been employed by mistake, as the TI, at the time of the sentence, was already delimited but not demarcated.

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- ²² TRF1 Itabuna, process 0002536-53.2013.4.01.3301, decision of 21 October 2013.
- ²³ STF, SL758, decisions of 24 February and 20 May 2014.
- ²⁴ TRF1, HC 0014723-10.2010.4.01.0000/BA, opinion of the judge-rapporteur of 5 May 2010, p. 3; p. 3; p. 4; STJ HC 292.982-BA, decision of 29.4.2014, p. 2; p. 2; p. 2 (respectively).
- ²⁵ Resolução nº 15 de 25 de agosto de 2010, Art. 1 (Secretaria de Direitos Humanos Conselho de Defesa dos Direitos da Pessoa Humana).
- ²⁶ TRF1, SLAT 0045011-67.2012.4.01.0000, decision of 19 July 2010.
- ²⁷ *Ibid.*, p. 8.
- ²⁸ TRF1 Itabuna, process 1825-23.2010.4.01.3311. The Federal Court of first instance dismissed the case in October 2014, whereupon the MPF filed an appeal to the TRF1.
- ²⁹ JF/SP process 0015210-17.2014.4.03.6100. A first instance decision which dismissed the action for prescription (26a Vara/SP, decision of 26 August 2014) was overturned by the Higher Regional Court (TRF3, decision of 26 March 2015), referring the case back to the lower court.
- ³⁰ TRF1 Roraima, process 0009580-11.2014.4.01.4200. The Federal Court of first instance conceded a preliminary injunction (decision of 25 March 2015), ruling the demand that indigenous auto-declarations have to be confirmed by “at least three” community leaders to be “unreasonable” (*desarrazoado*).
- ³¹ STF MS 29.087, decision of 16 September 2014.
- ³² STF MS 29.087, acórdão, p. 41f.
- ³³ Reporting Judge Luís Roberto Barroso, STF, Embargos de Declaração PET 3.388 RR, item 10.
- ³⁴ Lei. (4348/1964) Lei nº 4.348, de 26 de Junho de 1964. *Estabelece normas processuais relativas a mandado de segurança*. Brasília: Presidência da República. Lei. (4348/1964) Lei nº 4.348, de 26 de Junho de 1964. *Estabelece normas processuais relativas a mandado de segurança*. Brasília: Presidência da República. Lei 4348/1964: Art. 4.